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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1180

JOHN THOMAS FLOWER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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The petitioner has urged that certiorari be granted to determine whether his conviction for distributing a leaflet while standing on the sidewalk of a heavily traveled public roadway which runs through an open military reservation violates the First Amendment.

The respondent opposes certiorari, contending that petitioner failed to exhaust other methods of attack on the order barring him from the base before returning to distribute the leaflet. The argument is that since the petitioner disputed the accuracy of the information upon which the debarment order was based, he had an obligation to seek administrative review either by asking the commander to reseind the order, or by requesting permission to distribute his leaflet on the base despite the order barring him from doing so. Had the commander denied either request, the respondent argues that petitioner would have had a further obligation to bring an affirmative action in the district

court challenging the commander's action as arbitrary or capricious.

This is an intolerable and unnecessary burden and a procedure which respondent has devised as an afterthought to bolster the opinion below. It can in no way be regarded as an available administrative remedy which petitioner was on notice not to bypass. Indeed, to require petitioner to appeal his debarment order to the very official who had issued it in the first instance "would be to force resort to an arid ritual of meaningless form." *Staub* v. *Baxley*, 355 U.S. 313, 320 (1958).

Petitioner has challenged the regulation under which he was denied the right to distribute leaflets and barred from the base as an unconstitutional means of licensing speech, completely devoid of "narrow, objective, and definitive standards to guide the licensing authority." *Shuttlesworth* v. *Alabama*, 394 U.S. 147, 151 (1969). Although the respondent argues that the military jurisdiction within which this regulation could be applied serves to insulate it from petitioner's constitutional objections, this Court has pointed out in a similar context that "[i]t is less than realistic to ignore the relevant surrounding circumstances." *Shuttlesworth* v. *Birmingham*, 394 U.S. at 156. All the circumstances in this case indicate that the regulation in question was discriminatorily applied to petitioner as he stood on a public thoroughfare. "The Constitution can hardly be thought to deny one subjected to the restraints of such [a regulation] the right to attack its constitutionality, because he has not yielded to its demands." *Staub* v. *Baxley*, 355 U.S. at 319.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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